IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.276 OF 2006

...

M/s.Shama Construction Co. ...Petitioner

v/s.

The Chief Engineer (BW) MTNL ...Respondent

...

Mr.S.U.Kamdar i/b R.K. Singh for the Petitioner.

Ms.S.I. Shah i/b S.I.Shah & Co. for the Respondent.

AND

ARBITRATION PETITION NO.350 OF 2006

...

Mahanagar Telephone Nigam Ltd. ...Petitioner

v/s.

M/s.Shama Construction & Co.

and ors. ...Respondents

...

Ms.S.I.Shah i/b S.I.Shah & Co. for the Petitioner.

Mr.S.U.Kamdar i/b R.K.Singh for the Respondents.

...

CORAM: D.K.DESHMUKH, J.

DATED: 23RD AUGUST, 2006

P.C.:

1. Arbitration Petition No.276 of 2006 is filed by the claimant and Arbitration Petition No.350 of 2006 is filed by the Respondents in arbitration proceedings.

2. Relevant facts giving rise to these petitions are, there is a contract entered into between the claimant and the MTNL. There is an arbitration clause in that agreement. That clause empowers the Chief Engineer of MTNL to appoint an officer of the MTNL as an arbitrator. The clause further provided that in case the earlier officer who is appointed as an arbitrator is transferred or vacates his office or is unable to act for any reason, the Chief Engineer

can appoint another officer as an arbitrator. Initially by order dated 6-5-2005 the Chief Engineer in exercise of his power under the arbitration clause appointed Mr.H.K.Bansal as a sole arbitrator. It appears that Mr.Bansal was transferred from the post that he was holding when he was appointed as a sole arbitrator. Therefore, the Chief Engineer made an order dated 23-1-2006 substituting Mr.Bansal by Mr.A.K.Jain, another officer of MTNL. It appears that despite the substitution order dated 23-1-2006 made by the Chief Engineer the earlier appointed arbitrator Mr.H.K.Bansal insisted on continuing with the arbitration proceeding.

3. The Respondent has, therefore, filed Arbitration Petition No.350 of 2006 claiming appropriate orders, whereas the claimant has filed Arbitration Petition No.276 of 2006 contending that subsequently appointed arbitrator Mr.A.K.Jain is not competent to act as an arbitrator unless the court makes an order under Section 14 terminating mandate of Mr.Bansal and till that happens Mr.Bansal has the authority to continue as an arbitrator.

4. I have heard the learned Counsel for both sides. The learned Counsel appearing for the claimant in support of his submission that once arbitration proceedings are commenced before Mr.Bansal, unless parties enter into an agreement about change of arbitrator, it is only the court which can make an order for termination of the mandate of the arbitrator and the Chief Engineer could not have appointed an arbitrator, relies on two judgments, one in the case of **K. Narayana Raju v/s. Union of India, 2006 (2) Arb LR 267 (AP)** of Andhra Pradesh High Court and another in case of **Inder Sain Mittal v/s. Housing Board, Haryana and ors. AIR 2002 SC 1157** of the Supreme Court.

5. For deciding these two petitions, in my opinion, wordings of arbitration clause admittedly existing between the parties are material. Arbitration clause reads as under:-

> **53.1 For Contract other than with Public Sector Undertakings.** Except as otherwise expressly provided in the contract all or any questions, claims and disputes relating to the meaning of specifications, designs, drawings

and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, breach, matter or thing whatsoever in any way arising out of or relating to this contract/tender documents, designs, drawings, specifications, estimates, instructions, order, conditions, meaning and operation or effect of the contract or breach thereof or otherwise concerning the works or the execution or failure to execute same whether arising during the progress of work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Chief Engineer (BW) MTNL, Mumbai. It will be no objection to any such appointment that the arbitrator so appointed is a Government/MTNL servant, that he had to deal with the matters to which the contract relates and that in the course of his duties as Government/ MTNL servant he had expressed views on all or any of the matters in dispute, or difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being

unable to act for any reason, at the time of such transfer or vacation of the office or inability to act the Chief Engineer (BW) as aforesaid at the time of such transfer, vacation or inability to act, shall appoint another person to act as an arbitrator in accordance with the terms of the contract. Such persons shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than the person appointed by such Chief Engineer (BW), MTNL, Mumbai as aforesaid should act as an arbitrator. In all cases where the amount of the claim in the disputes is Rs.75,000/- (Rupees Seventy Five thousand only) and above, the arbitrator shall give reason for the award. Subject to as aforesaid the provisions of Indian Arbitration and Reconciliation Act, 1996 or any relevant statutory modification or reenactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause. It is a term of the contract that the party invoking arbitration

> shall specify the dispute or disputes to be referred to the arbitration under this clause together with the amount or amounts claimed in respect of each such dispute. If the contractor does not make any demand for arbitration in respect of any claim(s) in writing to CE(BW)MTNL, Mumbai, within 90 days of receiving the intimation from the MTNL that the bill is ready for payment, the claim of the contractor(s) will be deemed to have been waived and absolutely barred and the MTNL shall be discharged and released of on liabilities under this contract in respect of this claims. Arbitrator(s) may from time to time with the consent of both the parties enlarge the time for making and publication of the Arbitration Award.
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> (emphasis supplied)

6. Perusal of the abovequoted clause makes it clear that the power to appoint an arbitrator vests in the Chief Engineer. The Chief Engineer is also conferred power to change the arbitrator appointed by him in case the officer who has been appointed by him as an arbitrator is transferred from the post which he is

holding at the time of his appointment as arbitrator or he vacates the office and or becomes unable to function as an arbitrator for any reason. Relevant provisions to the statute is Section 14 of the Arbitration Act. Section 14 reads as under:-

> 14. Failure or impossibility to act.- (1) The mandate of an arbitrator shall terminate if-
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> (a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and
>
> (b) he withdraws from his office or the parties agree to the termination of his mandate.
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> (2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the court to decide on the termination of the mandate.
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> (3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from

> his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in his section or sub-section (3) of section 12.

7. Perusal of section 14 makes it clear that one of the contingency in which the mandate of the arbitrator comes to an end is where the parties agreed to the termination of the mandate of the arbitrator. There is nothing in the provisions of Section 14 and I have also not been pointed any other provisions in the Act which lays down that this agreement which is referred to in sub-section 1 of Section 14 about the termination of the mandate of the arbitrator should be after the commencement of the arbitral proceeding. In my opinion, parties are free to enter into an agreement about termination of the mandate of the arbitrator in certain contingencies even before the arbitration proceedings are commenced. They can agree on a procedure for termination of the mandate of the arbitrator at the time when they are entering into the arbitration agreement also. That is what has happened in the present case. The parties by clause 53.01 quoted

above agreed that if the officer of the MTNL who is appointed as an arbitrator, during the pendency of the arbitral proceedings is transferred from the office, which he was holding at the time of his appointment or vacates his office for any other reason than transfer or becomes unable to act as an arbitrator, the Chief Engineer can terminate the mandate of that officer as an arbitrator and appoint some other officer as an arbitrator and therefore, in my opinion, the order made by the Chief Engineer substituting Mr.Bansal dated 23-1-2006 was not only in consonance with the agreement between the parties, but also in accordance with law. Once Mr.Jain is appointed as an arbitrator, obviously Mr.Bansal can not function as an arbitrator. As the moment Mr.Jain is appointed as an arbitrator, the mandate of Mr.Bansal comes to an end. So far as the judgment of the Supreme Court relied on by the learned Counsel for the claimant is concerned, in that case though the officer who was appointed as an arbitrator was transferred, the arbitration proceedings continued with him and no substitute arbitrator was appointed. The Supreme Court in that judgment held that in that situation in spite of transfer as the arbitration proceedings continued before the same arbitrator, the

award made by him would be valid. It is, thus, clear from the judgment of the Supreme Court in the case of **Inder Sain Mittal** is not relevant for deciding the point that arises for consideration in these petitions. Similar, is the case with the judgment of the learned single Judge of the Andhra Pradesh High court. In my opinion, provisions of Section 14 and the arbitration clause between the parties is so clear that it leaves one no manner of doubt that once the Chief Engineer in exercise of his power under the agreement substitutes the arbitrator, the earlier arbitrator can not function.

8. Arbitration Petition No.276 of 2006 is therefore disposed of. Arbitration Petition No.350 of 2006 is also disposed of with a direction that as Mr.A.K.Jain has been appointed as an arbitrator in place of Mr.Bansal, the arbitration proceedings should be continued before Mr.A.K.Jain. No order as to costs.

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